

From: tom@wt6.usdoj.gov@inetgw
To: Microsoft ATR
Date: 1/28/02 2:09am
Subject: Microsoft Settlement

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I would like to comment on the "Proposed Final Judgment" (PFJ) to resolve the USDOJ's antitrust case against Microsoft.

First, it seems to me very likely that if this PFJ is approved, Microsoft's leadership will proclaim themselves to have been vindicated (despite conviction, which was upheld on appeal), and that they will proceed to ridicule and demean this judgment much like they did the previous consent decree, the abrogation of which led directly to this antitrust case. The reason behind my assertion is that the PFJ neither punishes Microsoft for any of their illegal acts, nor remedies the effects of those acts, nor offers any substantial protection against the likelihood of Microsoft committing similar illegal acts in the future. The PFJ leaves Microsoft's monopoly intact, leaves Microsoft with an extraordinary amount of cash that they have obtained from their monopoly, and allows them to continue leveraging their monopoly to compete unfairly with other businesses.

It seems obvious that the only way to protect other businesses from unfair competition based on Microsoft's monopoly is to isolate the monopoly products and their profits from Microsoft's other business concerns. A crude way to do this would be to split Microsoft into two pieces: a monopoly platform software business, and an independent non-monopoly business. This is what the DOJ originally proposed and Judge Jackson ordered, so it is surprising that such a remedy is no longer under consideration. I wonder why that is?

There also exists an alternative approach to this problem that is simpler, may be more effective, and almost certainly would be much more beneficial to all sectors of the public: release Microsoft's monopoly platform software products under a strong open source license such as the GNU GPL. This would satisfy Microsoft's OEMs by allowing them full access to the source code and giving them the right to modify and reproduce the software freely; it would also ensure Microsoft full access to any further developments made to the code base; but the critical effect would be to eliminate Windows as a monopoly, therefore eliminating all prospect of Microsoft abusing that monopoly. (Microsoft would also have to give up the Windows trademark, which should be assigned to a standard group, such as has already been done with the Unix trademark.) While this may seem a bit unconventional, the basic fact is that open sourcing Windows would put it on the same footing (except for its vast advantage in legacy applications and hardware support) as its only remaining competition (Linux and BSD Unix). We also know from experience with open source software that it can continue to be developed and even become significantly more robust even without business sponsors.

I don't see how anything less than such a solution begins to solve the monopoly leverage problem. However, if you must limit yourself to a "behavioral" solution, the PFJ needs to be strengthened in several ways:

- 1) You should require that Microsoft publish and strictly adhere to a price list for all Windows-related operating system platform software, and all applications software that runs on Windows platforms. The PFJ limits this to the "top 20" OEMs, but the broader requirement would be simpler and clearer to implement and monitor, and would be less tempting to Microsoft to abuse. It is important here to include applications software in order to limit (at least make public) any suspicion of Microsoft using their platform software monopoly to subsidize their applications software business. Moreover, there should be no exclusions for "market development" consideration, since any

such exclusion would allow Microsoft to cut inequitable deals, and because with a monopoly already in hand there's no need for market development.

- 2) The prohibitions against Microsoft retaliation have too many exceptions. Is there really any reason to permit Microsoft to retaliate against an OEM other than non-payment or impropriety in accounting?
- 3) All Microsoft interface specifications and documentation that are made available to OEMs, IHVs, ISVs, etc., should be made available to all parties on equal terms. In particular, there should be no discrimination against noncorporate developers or users (especially open source software developers). There should be no restrictions in Microsoft licenses or contracts against reverse engineering.
- 4) There should be a requirement that formats for all data that is stored to disk by Microsoft platform software and/or operating systems be documented and freely licensed; this is intended to eliminate one significant method that can be used to lock current customers in and unfairly perpetuate Microsoft's monopoly position (although it would be a good rule to apply to software companies, as it protects users' investments in their data).
- 5) There should be some form of oversight to prevent Microsoft from using lawsuits to hobble potential competition, including open source software developers.
- 6) There should be severe restrictions against Microsoft buying other companies. In general, it would be much more appropriate for Microsoft to pay its monopoly profits out to shareholders as dividends which would be reinvested diversely than to allow Microsoft to extend its monopoly through acquisition.
- 7) The "security" loophole needs to be carefully monitored to prevent abuse.
- 8) It's not clear what the enforcement mechanism in the PFJ is. There needs to be a method to prevent Microsoft from acting in violation of the agreement, rather than depending on decade-long post facto litigation.
- 9) The Technical Committee proposal needs to be expanded to include some degree of oversight and review from more sectors of the public. The PFJ seems to be preoccupied with concerns of OEMs, but there are many other recognizable groups which have distinct concerns, including the open source community and several classes of end-users.

An important thing to note in these nine points is that not only do they fall short of a structural or open source remedy, they are actually much milder than traditional monopoly regulation, which often requires regulatory approval of prices and contract terms and strictly prohibits non-monopoly business activities. (E.g., AT&T before their breakup.)

Another thing to note is that while Microsoft has effectively destroyed any possibility of another commercial software company challenging them in the areas which they monopolize, it is still possible that Microsoft's behavior can be mitigated by market factors due to open source software. Open source already operates at a considerable disadvantage vs. Microsoft (look at Microsoft's balance sheet), so we need to be very careful that nothing we do here further disadvantages the open source alternative.

I've also read the dissenting States' counterproposal, which is much clearer and preferable regarding OEM contracts and retaliation, but contains several proposed remedies that are, I think, counter-productive. These include:

- 1) Open sourcing Internet Explorer: While this has some poetic justice, IE (assuming it is extractable from Windows, which Microsoft contends it is not) has no value as open source itself, especially without a strong commitment (which can hardly be mandated) from Microsoft to the open source process.
- 2) Requiring Microsoft to distribute Java: This strikes me as inappropriate direction to Microsoft (it is one thing to tell Microsoft not to do something, but forcing them to do something they do not want to do is not likely to be a happy solution for anyone); it also strikes me as inappropriate to mandate Java as a standard, especially given that it is controlled by a private company.

For whatever it's worth, I am a software engineer and writer. I've used Microsoft products extensively for over 20 years, as well as Unix for a similar period, and have worked on software products for a similar period -- both applications and system software, including operating systems and programming languages. I feel that Microsoft did some remarkable work in their earlier years, but I've noted that their products have deteriorated and become markedly more ominous, especially since Windows 95 and the advent of IE, although one might also dateline this against the emergence of Bill Gates as the world's richest man. When I was growing up it was often said that "power corrupts, and absolute power corrupts absolutely" -- I think we've started to see the fruits of that truism in Gates and Microsoft. At the start of this antitrust case it was often opined that the case would amount at best to "too little, too late." If you accept the PFJ, that opinion will be affirmed, and it will be left to some future generation to stand up to the corruption of Microsoft's power. I pray that this court can and will stand up for us now.

Thank you for the opportunity to comment.

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* Tom Hull * thull at kscable.com * <http://www.tomhull.com/>
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